

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

JOSHCO TECH, LLC,

Plaintiff(s),

v.

DOES 1-4,

Defendant(s).

Case No. 2:20-CV-521 JCM (EJY)

ORDER

Presently before the court is defendant Cheryl White's ("White") motion to dismiss for lack of personal jurisdiction, or alternatively for failure to state a claim for which relief can be granted. (ECF No. 10). Plaintiff JoshCo Tech, LLC ("JoshCo") filed a response (ECF No. 14), to which defendant replied. (ECF No. 16).

I. Background

This matter arises from an alleged copyright infringement under the Copyright Act of 1976, 17 U.S.C. § 101. (ECF No. 7). JoshCo owns a valid copyright registration for its Miniaturized Disability Benefits Questionnaire ("mini-DBQ") that was allegedly infringed by White. (*Id.*). JoshCo's mini-DBQs are used to simplify the information that veterans must provide when applying for VA benefits for the first time or seeking to increase VA benefits. (*Id.*). On September 28, 2018, a certificate of registration was issued by the U.S. Copyright Office to JoshCo for the mini-DBQs that are the subject of this claim. (ECF No. 7-1).

White is the registrant and operator of vradvisors.org. (ECF No. 7). JoshCo alleges that White uses her website to solicit veterans to input their contact information into the website, and then sends Nevada residents forms that infringe JoshCo's copyright. (*Id.*). By specifically advertising to veterans, White targets Nevada and Nevada's veteran community because Nevada

1 has one of the highest percentage of veterans. (*Id.*). JoshCo contends that jurisdiction is proper
 2 because its claim for copyright infringement arises out of this Nevada directed distribution by
 3 White. (*Id.*).

4 White describes her involvement as solely “providing referrals to Zeplin.” (EFC No. 10).
 5 Zeplin Global Group, LLC (“Zeplin”) is a California limited liability company. (EFC No. 10.1).
 6 White alleges that she has never contributed any content to vradvisors.org and that the domain
 7 points to a website owned and operated by Zeplin. (EFC No. 10). White’s only connection to
 8 the mini-DBQs is her referral of veterans to Zeplin by providing them links to a DocuSign
 9 website where veterans can fill out one of Zeplin’s mini-DBQs. (*Id.*). White receives a fee from
 10 Zeplin for her referral services. (*Id.*).

11 White admits that she has provided DocuSign links to ten (10) persons in Nevada to
 12 complete mini-DBQs. (EFC No. 10). She also admits that she has contacted approximately
 13 twelve (12) veterans in Nevada. (*Id.*). White alleges that these twelve (12) Nevada veterans are
 14 among the more than 500 veterans that she has contacted across the U.S. (*Id.*). However, she
 15 argues this is not enough to establish personal jurisdiction over her. (*Id.*). White is a California
 16 resident, does not do any business in Nevada, or own any land in Nevada, and therefore
 17 exercising jurisdiction over her is improper. (*Id.*).

18 On June 2, 2020, Joshco filed its amended complaint alleging direct copyright
 19 infringement, 17 U.S.C. § 501 *et seq.* against White. (EFC No. 7).

20 White now moves to dismiss for lack of personal jurisdiction. (EFC No. 10). In the
 21 alternative, White moves to dismiss for failure to state a claim. (*Id.*).

22 **II. Legal Standard**

23 *A. Personal Jurisdiction*

24 Federal Rule of Civil Procedure 12(b)(2) allows a defendant to move to dismiss a
 25 complaint for lack of personal jurisdiction. *See* Fed. R. Civ. P. 12(b)(2). To avoid dismissal
 26 under Rule 12(b)(2), a plaintiff bears the burden of demonstrating that its allegations establish a
 27 *prima facie* case for personal jurisdiction. *See Boschetto v. Hansing*, 539 F.3d 1011, 1015 (9th
 28 Cir. 2008). Allegations in the complaint must be taken as true, and factual disputes should be

1 construed in the plaintiff's favor. *Rio Props., Inc. v. Rio Int'l Interlink*, 284 F.3d 1007, 1019 (9th
2 Cir. 2002).

3 However, the court "may not assume the truth of allegations in a pleading which are
4 contradicted by affidavit." *Mavrix Photo, Inc. v. Brand Technologies, Inc.*, 647 F.3d 1218, 1223
5 (9th Cir. 2011) (quoting *Data Disc, Inc. v. Sys. Tech. Assocs., Inc.*, 557 F.2d 1280, 1284 (9th Cir.
6 1977)). Additionally, "mere 'bare bones' assertions of minimum contacts with the forum or legal
7 conclusions unsupported by specific factual allegations will not satisfy a plaintiff's pleading
8 burden." *Lang v. Morris*, 823 F. Supp. 2d 966, 969–70 (N.D. Cal. 2011) (citing *Fiore v. Walden*,
9 657 F.3d 838, 846–47 (9th Cir. 2011)).

10 Personal jurisdiction is a two-prong analysis. First, an assertion of personal jurisdiction
11 must comport with due process. See *Wash. Shoe Co. v. A-Z Sporting Goods Inc.*, 704 F.3d 668,
12 672 (9th Cir. 2012). Next, "[w]hen no federal statute governs personal jurisdiction, the district
13 court applies the law of the forum state." *Boschetto*, 539 F.3d at 1015; see also *Panavision Int'l*
14 *L.P. v. Toeppen*, 141 F.3d 1316, 1320 (9th Cir. 1998). Because Nevada's "long-arm" statute
15 provides for personal jurisdiction to the fullest extent of the due process clause, the court need
16 only apply federal due process standards. See *Arbella Mut. Ins. Co. v. Eighth Judicial Dist.*
17 *Court*, 134 P.3d 710, 712 (Nev. 2006) (citing Nev. Rev. Stat. § 14.065); see also *Boschetto*, 539
18 F.3d at 1015.

19 Two categories of personal jurisdiction exist: (1) general jurisdiction and (2) specific
20 jurisdiction. See *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 413–15
21 (1984); see also *LSI Indus., Inc. v. Hubbell Lighting, Inc.*, 232 F.3d 1369, 1375 (Fed. Cir. 2000).

22 "[T]he place of incorporation and principal place of business are paradigm bases for
23 general jurisdiction." *Daimler AG v. Bauman*, 571 U.S. 117, 137 (quotation marks and citation
24 omitted). A court may also assert general jurisdiction over a defendant when the plaintiff shows
25 that "the defendant has sufficient contacts that approximate physical presence." *In re W. States*
26 *Wholesale Nat. Gas Litig.*, 605 F. Supp. 2d 1118, 1131 (D. Nev. 2009) (internal quotation marks
27 and citations omitted).

1 In other words, the defendant's affiliations with the forum state must be so "continuous
 2 and systematic" so as to render the defendant essentially "at home" in that forum. *See Daimler*
 3 *AG v. Bauman*, 571 U.S. at 137. General jurisdiction is appropriate even if the defendant's
 4 continuous and systematic ties to the forum state are unrelated to the litigation. *See Tuazon v.*
 5 *R.J. Reynolds Tobacco Co.*, 433 F.3d 1163, 1171 (9th Cir. 2006) (citing *Helicopteros Nacionales*
 6 *de Colombia, S.A.*, 466 U.S. at 414–16).

7 Alternatively, the Ninth Circuit has established a three-prong test for analyzing an
 8 assertion of specific personal jurisdiction:

9 (1) The non-resident defendant must purposefully direct his
 10 activities or consummate some transaction with the forum or
 11 resident thereof; or perform some act by which he purposefully
 12 avails himself of the privilege of conducting activities in the
 13 forum, thereby invoking the benefits and protections of its laws;

12 (2) the claim must be one which arises out of or relates to the
 13 defendant's forum-related activities; *and*

14 (3) the exercise of jurisdiction must comport with fair play and
 15 substantial justice, *i.e.*, it must be reasonable.

15 *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 802 (9th Cir. 2004) (emphasis added).

16 Under the Ninth Circuit's test for specific jurisdiction, "plaintiff bears the burden of
 17 satisfying the first two prongs of the test. If the plaintiff fails to satisfy either of these prongs,
 18 personal jurisdiction is not established in the forum state." *Id.* If the plaintiff succeeds in
 19 satisfying the first two prongs, the burden then shifts to the defendant to "present a compelling
 20 case" that the exercise of jurisdiction would be unreasonable. *Id.*

21 Under the first prong of the three-part specific jurisdiction test, plaintiff must establish
 22 that the defendant either purposefully availed itself of the privilege of conducting activities in the
 23 forum state, or purposefully directed its activities toward the forum state. *Id.* The Ninth
 24 Circuit has noted that purposeful availment and purposeful direction are two distinct concepts.
 25 *Lang v. Morris*, 823 F. Supp. 2d 966, 970 (N.D. Cal. 2011). A purposeful availment analysis is
 26 most often used in suits sounding in contract, whereas a purposeful direction analysis is most
 27 often used in suits sounding in tort. *See Doe v. Unocal Corp.*, 248 F.3d 915, 924 (9th Cir. 2001);
 28 *see Dole Food Co., Inc. v. Watts*, 303 F.3d 1104, 1111 (9th Cir. 2002). A copyright infringement

1 claim generally sounds in tort, and therefore a purposeful direction analysis is appropriate.
 2 *See Wash. Shoe Co.*, 704 F.3d at 675 (“We have characterized copyright infringement as a ‘tort,’
 3 and suggested that willful infringement is an intentional tort.”) (internal citations omitted).

4 The Supreme Court has held that due process permits the exercise of personal jurisdiction
 5 over a defendant who “purposefully directs” his activities at residents of a forum, even in the
 6 “absence of physical contacts” with the forum. *Burger King Corp. v. Rudzewicz*, 471, 476 U.S.
 7 462 (1985) (citing *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774–75 (1984)). A showing
 8 that a defendant purposefully directed his conduct toward a forum state usually consists of
 9 evidence of the defendant’s actions outside the forum state that are directed at the forum, such as
 10 the distribution in the forum state of goods originating elsewhere. *Keeton*, 465 U.S. at 774–75
 11 (finding purposeful direction where defendant published magazines in Ohio and circulated them
 12 in the forum state, New Hampshire). *Schwarzenegger*, 374 F.3d at 803.

13 The Ninth Circuit evaluates purposeful direction under the three-part “effects” test
 14 traceable to the Supreme Court’s decision in *Calder v. Jones*, 465 U.S. 783, 789 (1984) and as
 15 follows:

16 *Calder* stands for the proposition that purposeful availment is satisfied even by a
 17 defendant “whose only ‘contact’ with the forum state is the ‘purposeful direction’
 18 of a foreign act having effect in the forum state.” . . . [Under] *Calder*, the
 “effects” test requires that the defendant allegedly have (1) committed an
 intentional act, (2) expressly aimed at the forum state, (3) causing harm that the
 defendant knows is likely to be suffered in the forum state.

19 *Schwarzenegger*, 374 F.3d at 803 (citing *Dole Food*, 303 F.3d at 1111).

20 **III. Discussion**

21 Defendant White moves to dismiss this case for lack of personal jurisdiction pursuant to
 22 Fed. R. Civ. P. 12(b)(2). Alternatively, White moves to dismiss this case for failure to state a
 23 claim.

24 This court finds no personal jurisdiction, and grants defendant’s request.

25 Neither party alleges that general jurisdiction exists here. Thus, this court examines
 26 specific jurisdiction. The Ninth Circuit’s test for specific jurisdiction requires JoshCo to satisfy
 27 the first two prongs of the three-part test. If JoshCo fails to satisfy either of these prongs,
 28

1 personal jurisdiction is not established in Nevada. Because JoshCo fails to satisfy the second
2 prong, this court finds jurisdiction over White improper.

3 Because copyright infringement is a claim sounding in tort, the first prong of the three-
4 part specific jurisdiction test requires JoshCo to establish that White purposefully directed her
5 activities toward Nevada. The Ninth Circuit evaluates purposeful direction under the three-part
6 “effects” test in *Calder v. Jones*, 465 U.S. at 789. Under *Calder*’s “effects” test, White must
7 have (1) committed an intentional act, (2) expressly aimed at Nevada, (3) causing harm that she
8 knows is likely to be suffered in Nevada. Evidence of White’s actions directed at Nevada will
9 normally support this showing. *Keeton*, 465 U.S. at 774–75. Here, JoshCo has failed to meet its
10 burden in satisfying the purposeful direction prong of the Ninth Circuit’s test.

11 This court first addresses whether White committed an intentional act when she,
12 allegedly, willfully infringed JoshCo’s copyright. The court finds that she did.

13 “An intentional act is an external manifestation of the actor’s intent to perform an actual,
14 physical act in the real world, not including any of its actual or intended results.” *Wash. Shoe*
15 *Co.*, 704 F.3d at 674. In this case, it is undisputed by the parties that White contacted
16 approximately twelve (12) veterans in Nevada and provided DocuSign links to ten (10) persons
17 in Nevada to complete mini-DBQs. (EFC No. 10). White’s act of contacting Nevada veterans
18 and providing DocuSign links to the mini-DBQ forms was an intentional act, completed in
19 exchange for a referral fee from Zeplin. (*Id.*). This intentional act satisfies part one of *Calder*’s
20 “effects” test. By intentionally engaging in the actual, physical act of contacting Nevada
21 residents and providing them with links to JoshCo’s alleged infringing forms, White has clearly
22 committed an “intentional act” within the meaning of the *Calder* test.

23 The court must next decide if White’s intentional act was expressly aimed at Nevada.
24 This court finds that it was not.

25 The Ninth Circuit has held that “[w]hen copyrights are held by corporations, the ‘right to
26 control the work’ will typically be exercised where the corporation is located. *Wash. Shoe Co.*,
27 704 F.3d at 678. The impact of an intentional violation of that right is necessarily directed at that
28 location.” *Id.* The court elaborated, “[b]ecause the harm caused by an infringement of

1 the copyright laws must be felt at least at the place where the copyright is held, ... the impact of
2 a willful infringement is necessarily directed there as well.” *Id.*

3 Here, JoshCo is the copyright holder, is located in Nevada, and alleges willful copyright
4 infringement. (EFC No. 7). However, the Ninth Circuit clarified in *Bancroft*, that *Calder* does
5 not stand for the broad proposition that a foreign act with foreseeable effects in the forum state
6 will always give rise to specific jurisdiction. *Bancroft & Masters, Inc. v. Augusta Nat’l Inc.*, 223
7 F.3d 1082, 1087 (9th Cir. 2000). The court defined the “something more” that is needed to
8 assert specific jurisdiction as “express aiming” at the forum state. *Pebble Beach Co. v. Caddy*,
9 453 F.3d 1151, 1156 (9th Cir. 2006) (citing *Bancroft*, 223 F.3d at 1087).

10 In this case, White’s conduct must rise above mere untargeted negligence. *Id.* at 1088
11 (citing *Brainerd v. Governors of the University of Alberta*, 873 F.2d 1257, 1259–60 (9th Cir.
12 1989)). JoshCo argues that this court has personal jurisdiction over White because of her
13 conduct as the registrant and operator of vradvisors.org. (EFC No. 7). JoshCo alleges that
14 through this Nevada accessible interactive website, White solicited veterans to input their contact
15 information in order to send DocuSign links to forms that infringe its copyright. (*Id.*).

16 Neither party disputes that White contacted approximately twelve (12) veterans in
17 Nevada and provided DocuSign links to ten (10) persons in Nevada to complete JoshCo’s
18 alleged mini-DBQs. (EFC No. 10).

19 White relies on *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797 (9th Cir. 2004).
20 There, the Ninth Circuit concluded that jurisdiction was improper because Schwarzenegger
21 failed to make out a prima facie case that defendant expressly aimed its acts at California. *Id.* at
22 807. The court declined to exercise jurisdiction even though Schwarzenegger was able to show
23 defendant committed intentional acts that may have harmed him in California. *Id.*

24 In response, JoshCo proffers *Mavrix Photo, Inc. v. Brand Techs., Inc.*, 647 F.3d 1218 (9th
25 Cir. 2011). There, the Ninth Circuit found purposeful direction because the defendants acted
26 intentionally by reposting the infringing photos on Marvix’s website, used the photos to exploit
27 the California market for defendants’ own commercial gain, and it was foreseeable that the
28 economic loss would be inflicted in California. *Id.* at 1227–28. The court further recognized

1 that, “[n]ot all material placed on the Internet is, solely by virtue of its universal accessibility,
 2 expressly aimed at every state in which it is accessed. *Id.* at 1231. However, where “a website
 3 with national viewership and scope appeals to, and profits from, an audience in a particular state,
 4 the site’s operators can be said to be ‘expressly aimed’ at that state.” *Id.*

5 Similar to the court’s conclusion in *Schwarzenegger*, this court agrees that JoshCo made
 6 out a prima facie case that White committed intentional acts that may have harmed JoshCo in
 7 Nevada for the purpose of specific jurisdiction. However, JoshCo has failed to make out a prima
 8 facie case that White expressly aimed its acts at Nevada.

9 Because this court finds that White’s intentional act of sending DocuSign links to
 10 veterans was not expressly aimed at Nevada, JoshCo has failed to meet its burden in satisfying
 11 all three parts under *Calder*’s “effects” test. Accordingly, JoshCo has not presented a prima
 12 facie case of purposeful direction by White sufficient to survive a motion to dismiss for lack of
 13 personal jurisdiction. This claim’s defect cannot be remedied through amendment. Thus, this
 14 court dismisses JoshCo’s cause of action with prejudice.

15 **IV. Conclusion**

16 Accordingly,

17 IT IS HEREBY ORDERED, ADJUDGED, and DECREED that defendant’s motion to
 18 dismiss (ECF No. 10) be, and the same hereby is, GRANTED.

19 The clerk is ordered to close the case accordingly.

20 DATED October 26, 2020.

21 
 22 _____
 UNITED STATES DISTRICT JUDGE